Supreme Court, U.S.
FILED
APR 3 1998

No. 97-830

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, *et al.*,

Petitioners,

v.

IOWA UTILITIES BOARD, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF PETITIONERS ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, ET AL.

RICHARD J. METZGER
888 17th Street
Suite 900
Washington, D.C. 20006
(202) 969-2583

MITCHELL F. BRECHER*
DEBRA A. MCGUIRE
FLEISCHMAN AND WALSH, L.L.P.
1400 Sixteenth Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 939-7900

Counsel for Association for Local Telecommunications Services
[Additional Counsel Listed on Inside Cover]

April 3, 1998

*Counsel of Record

RILEY M. MURPHY
CHARLES H. N. KALLENBACH
JAMES C. FALVEY
AMERICAN COMMUNICATIONS
SERVICES, INC.
131 National Business Parkway
Suite 100
Annapolis Junction, MD 20701

Counsel for American Communications Services, Inc.

ALBERT H. KRAMER
ROBERT F. ALDRICH
DICKSTEIN, SHAPIRO, MORIN
& OSHINSKY, LLP
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700

CINDY Z. SCHONHAUT
VICE PRESIDENT,
GOVERNMENT AFFAIRS
ICG COMMUNICATIONS, INC.
9605 East Maroon Circle
Englewood, CO 80112
(303) 572-5960

Counsel for ICG Telecom Group, Inc.

DANIEL M. WAGGONER
DAVIS WRIGHT TREMAINE
2600 Century Square
150 4th Avenue
Seattle, WA 98101
(206) 622-3150

ALAINE MILLER
R. BRUCE EASTER
NEXTLINK
COMMUNICATIONS, L.L.C.
155 108th Ave., NE
Bellevue, WA 98004
(425) 519-8900

Counsel for NEXTLINK Communications, Inc.

TIMOTHY R. GRAHAM
ROBERT G. BERGER
JOSEPH SANDRI
RUSSELL C. MERBETH
WINSTAR COMMUNICATIONS,
INC.
1146 19th Street, NW
Washington, D.C. 20036
(202) 833-8547

*Counsel for Winstar
Communications, Inc.*

DANIEL L. BRENNER
NEAL M. GOLDBERG
DAVID L. NICOLL
1724 MASSACHUSETTS AVE. NW
WASHINGTON, D.C. 20036
(202) 775-3550

*Counsel for National Cable
Television Association, Inc.*

QUESTIONS PRESENTED

1. Whether the Eighth Circuit lawfully set aside the Federal Communications Commission's "most-favored-nation" rule, despite the Eighth Circuit's acknowledgment the rule is supported by the terms of the Telecommunications Act of 1996, based on the court's "belief" the rule would interfere with negotiated agreements between incumbents and new entrants.

2. Whether the Eighth Circuit correctly held that the Commission has no jurisdiction to promulgate rules implementing pricing requirements of the 1996 Act, that the Commission has only limited jurisdiction over some non-pricing requirements of the Act, and that state utility commissions have exclusive jurisdiction over the pricing and some non-pricing requirements of the Act, when the Commission explicitly has been granted the necessary authority to promulgate such rules.

LIST OF PARTIES AND RULE 29 DISCLOSURE STATEMENTS

The parties to the proceedings in the United States Court of Appeals for the Eighth Circuit are listed in the captions of the decisions below. *See* AT&T Corp. Appendix ("AT&T App.") A, 1a-4a; AT&T App. D, 73a-79a; AT&T App. E.*

The Rule 29 Disclosure Statements for the Association for Local Telecommunications Services, American Communications Services, Inc., ICG Telecom Group, Inc, NEXTLINK Communications, Inc., and WinStar Communications, Inc. are contained in the petition for a Writ of Certiorari in this case. The Rule 29 Disclosure Statement for the National Cable Television Association, Inc. is contained in the petition for a Writ of Certiorari in No.97-826, which has been consolidated with this case.

* With the permission of counsel for AT&T Corp., Petitioners are relying on the Appendix filed by AT&T Corp. on November 17, 1997.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

STATEMENT 1

SUMMARY OF ARGUMENT 12

ARGUMENT 15

I. THE EIGHTH CIRCUIT HAS EXCEEDED ITS JUDICIAL DISCRETION BY IGNORING PLAIN STATUTORY LANGUAGE, REJECTING THE FCC'S REASONABLE INTERPRETATION OF SECTION 252(i), AND SUBSTITUTING ITS OWN INTERPRETATION FOR THAT OF THE FCC 15

A. The Eighth Circuit ignored the plain statutory language 15

B. The FCC's interpretation was reasonable, as conceded by the Eighth Circuit, and should not have been rejected 18

Page

II. THE EIGHTH CIRCUIT'S DETERMINATION THAT THE FCC LACKED JURISDICTION TO IMPLEMENT THE 1996 ACT'S LOCAL COMPETITION REQUIREMENTS IS ERRONEOUS BECAUSE IT CONFLICTS WITH DECISIONS OF THIS COURT AND THE COURTS OF APPEALS 23

A. The Eighth Circuit's holding that the interconnection duties required by section 251 of the 1996 Act constitute intrastate communications services under section 2(b) is erroneous and conflicts with decisions of courts of appeals 23

B. Regardless of the applicability of section 2(b) of the Communications Act, the Eighth Circuit's denial of jurisdiction to the FCC is erroneous 26

CONCLUSION 31

TABLE OF AUTHORITIES

CASES Page

California v. FCC, 4 F.3d 1505 (9th Cir. 1993) . . . 25
California v. FCC, 39 F.3d 919 (9th Cir. 1994) 24, 25
Caminetti v. United States, 242 U.S. 470, 37 S. Ct. 192 (1917) 16
Chevron, U.S.A. v. NRDC, 467 U.S. 837 (1984) 12, 18, 21, 22
Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992) 17
Iowa Utils. Bd. v. FCC, 120 F. 3d 753 (8th Cir. 1997) . . . . . *passim*
Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355 (1986) 24
NARUC v. FCC, 880 F. 2d 422 (D.C. Cir. 1989) 4,24
NARUC v. FCC, 746 F.2d 1492 (D.C. Cir. 1984) . . 25
NCUC v. FCC, 552 F.2d 1036 (4th Cir. 1977) 4
NCUC v. FCC, 537 F.2d 787 (4th Cir. 1976) . 4, 24, 25
National R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407 (1992) 11
Puerto Rico Tel. Co. v. FCC, 553 F.2d 694 (1st Cir. 1977) 25
State Corp. Comm'n v. FCC, 787 F.2d 1421 (10th Cir. 1986) 25

AGENCY DECISIONS

Detariffing the Installation and Maintenance of Inside Wiring, 103 FCC 2d 476 (1986), *aff'd sub nom. NARUC v. FCC*, 880 F.2d 422 (D.C. Cir. 1989) . . . 4

Page

In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499 (1996) . . . . . *passim*
Microwave Communications, Inc., 18 FCC 2d 953 (1969) 5
MTS & WATS Market Structure, 81 FCC 2d 177 (1980) 5
Second Computer Inquiry, 77 FCC 2d 384 (1980), *aff'd sub nom., Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) 4,5
Specialized Common Carrier Services, 29 FCC 2d 870 (1971), *aff'd sub nom. Washington Utils. & Transp. Comm'n v. FCC*, 513 F.2d 1142 (9th Cir. 1975) 5
In the Matter of TCG Colorado; Docket No. 96A-329T, adopted November 5, 1996 19
Use of the Carterfone Device in Message Toll Telephone Service, 13 FCC 2d 420 (1968) 4

STATUTES AND LEGISLATIVE HISTORY

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) 1
28 U.S.C. § 2112 10
§ 2342(1) 10
47 U.S.C. § 151 28
§ 152(b) 3, 10, 23, 26
§ 153(22) 26
§ 154(i) 28
§§ 201-205 4
§ 201(a) 28
§ 201(b) 28

§§ 251-61 . . . . . 1, 5
§ 251 . . . . . *passim*
§ 251(c) 10
§ 251(c)(2) 6, 29, 30
§ 251(c)(3) 6, 27
§ 251(c)(4) 6,27
§ 251(c)(6) 30
§ 251(d) 25
§ 251(d)(1) 7, 30
§ 251(d)(2) 27
§ 252 . . . . . *passim*
§ 252(a) 7, 29
§ 252(b)(1) 7
§ 252(b)(4)(C) 7
§ 252(c)(1) 28
§ 252(c)(2) 22, 29, 30
§ 252(d) 10, 27, 29, 30
§ 252(e) 7
§ 252(e)(6) 7
§ 252(i) . . . . . *passim*
§ 253(a) 5
§ 253(d). 5
§ 303(r) 28
§ 402(a) 10
§ 410 25
H.R. Rep. No. 104-204 (1995) 1n.1, 31

FEDERAL REGULATIONS

47 C.F.R. § 51.809(a) 2 n.3, 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-830

ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, *et al.*,

Petitioners,

v.

IOWA UTILITIES BOARD, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF PETITIONERS ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, ET AL.

STATEMENT

This case concerns portions of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"), which added provisions to the Communications Act of 1934 to permit competition in local telephone markets.[1] 47 U.S.C. §§ 251-61. In general, these local competition provisions envision three methods by which competitors can enter local telephone markets, establish strict time limitations

[1] H.R. Rep. No. 104-204, at 89 (1995).

by which the provisions must be implemented, and preempt contrary state laws.

In the decision under review, the Eighth Circuit rendered significant portions of the 1996 Act's requirements meaningless by holding that the Commission exceeded its jurisdiction when it promulgated rules to implement and enforce the Act's requirements. The Eighth Circuit vacated the Commission's rules regarding pricing, as well as certain rules related to non-pricing issues, based on its view that state utility commissions had exclusive authority to implement these requirements. The Eighth Circuit did hold that the Commission had jurisdiction to promulgate rules regarding some of the Act's requirements. However, the court also vacated the Commission's "most-favored-nation rule,"[2] even though the terms of the 1996 Act support the Commission's approach, as the court acknowledged, and state utility commissions have uniformly interpreted the Act in a similar manner to the Commission.

The principal purpose of the 1996 Act provisions that amended the Communications Act was to promptly and efficiently open the local telephone markets to competition. The Eighth Circuit's decision thwarts this purpose by denying the Commission the ability that was contemplated by the 1996

---

[2]The FCC's "most-favored-nation" rule implements section 252(i) of the 1996 Act. 47 C.F.R. § 51.809(a) (1996). The Eighth Circuit adopted the pejorative phrase "pick and choose" originally applied by one appellant in its challenge to the rule. Petitioners will refer to the FCC rule using the legal term of art -- "most-favored-nation" -- in the remainder of this brief.

Act to issue rules that foster local competition. The Eighth Circuit frustrates achievement of the 1996 Act's objectives in another way, by leaving to a multitude of state utility commissions the implementation of the Act's requirements, thereby opening competition in local telephone markets on piecemeal and inconsistent bases.

Regulation of Local Telephone Services

Prior to passage of the 1996 Act, all local telephone service was provided by companies pursuant to exclusive certificates of authority from state and local government authorities. These service providers, known as local exchange carriers ("LECs"), constructed and operated telephone systems consisting of lines, switches, and other equipment, which enabled all telephones within the franchise area to place calls to and receive calls from any other telephone in the area. Long distance service between local calling areas was provided by interexchange carriers, which were commonly known as long distance carriers. The incumbent LECs furnished the long distance carriers with exchange access services, whereby the long distance carriers used the LECs' systems to originate and terminate long distance services within the local exchanges.

Section 2(b) of the Communications Act provides that states have exclusive jurisdiction to regulate the rates for intrastate communications services, which include local exchange services, and intrastate exchange access. 47 U.S.C. § 152(b). Intrastate regulation is performed by state utility commissions. The FCC has exclusive jurisdiction over foreign and interstate communications services, such as the LECs' provision of interstate exchange access services. 47 U.S.C. §§ 152(a), 201-05.

Traditionally, local telephone services were considered to be a natural monopoly, in part because the task of duplicating the vast local networks was prohibitively expensive. Therefore, the Commission and all states protected local exchange carrier services from any competition.

Initial Attempts to Promote Competition for Local Telephone Services

Until the 1970s, the incumbent LECs were not faced with competition related to the provision of any aspect of local exchange telephone services, including the sale or rental of telephone sets, and facilities within their respective franchise areas. Over time, however, the FCC began to exercise its jurisdiction over interstate communication services to enable other companies to compete with LECs in the sale of telephone sets and other customer premises equipment. *NCUC v. FCC*, 552 F.2d 1036 (4th Cir. 1977); *NCUC v. FCC*, 537 F.2d 787 (4th Cir. 1976); *Use of the Carterfone Device in Message Toll Telephone Service*, 13 FCC 2d 420 (1968). The FCC also required LECs to interconnect with other vendors' equipment and to sell their own telephone services separately from customer premises equipment. *Second Computer Inquiry*, 77 FCC 2d 384 (1980), *aff'd sub nom. Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) (hereinafter "*Second Computer Inquiry*"). In addition, the FCC required LECs to offer customer premises equipment on a non-tariffed, unregulated basis. *Id.*

The FCC next applied such competitive requirements to inside wiring and enhanced services. *Detariffing the Installation and Maintenance of Inside Wiring*, 103 FCC 2d 476 (1986), *aff'd sub nom. NARUC v. FCC*, 880 F.2d 422

(D.C. Cir. 1989); *Second Computer Inquiry*. As indicated, the FCC's introduction of competition to these services was affirmed by several courts of appeals decisions.

The FCC also adopted policies allowing competition in the provision of interstate long distance services. *MTS and WATS Market Structure*, 81 FCC 2d 177 (1980); *Specialized Common Carrier Services*, 29 FCC 2d 870 (1971), *aff'd sub nom. Washington Utils. & Transp. Comm'n v. FCC*, 513 F.2d 1142 (9th Cir. 1975); *Microwave Communications, Inc.*, 18 FCC 2d 953 (1969).

Local Competition Provisions of the 1996 Act

As part of the 1996 Act, Congress enacted an additional subtitle to the Communications Act, 47 U.S.C. §§ 251-61, for the purpose of developing local competitive markets. This portion of the 1996 Act establishes a framework whereby all telephone customers eventually could choose their local carrier. The 1996 Act aimed to eliminate all obstacles to entering the local telephone market. These "local competition" provisions preempted all state laws and regulations that acted as barriers to entering any aspect of local telephone markets.

Section 253(a) of the 1996 Act invalidates state and local requirements that have the effect of preventing any entity from "offering any interstate or intrastate service," and section 253(d) permits the FCC to preempt any such requirements. The 1996 Act also sets forth the standards that the FCC must follow when issuing and enforcing regulations that preempt state requirements. 47 U.S.C. § 253(d).

In addition to allowing the FCC to preempt state

requirements that deny entry into local telephone markets, the 1996 Act places on all incumbent LECs duties to permit new market participants to utilize incumbent LEC networks and facilities to provide competing local service. The 1996 Act requires incumbent LECs to facilitate competition in local telephone services.

First, section 251(c)(2) directs incumbent LECs to interconnect their local exchange networks with those of competing carriers at "rates, terms, and conditions" that are "just, reasonable, and nondiscriminatory," for the purpose of enabling competing carriers to provide services including local exchange and exchange access services. Second, section 251(c)(3) requires incumbent LECs to allow new entrants to purchase, on an unbundled basis, separate elements of the incumbent local exchange carrier networks at "rates, terms, and conditions" that are "just, reasonable, and nondiscriminatory," and based on cost. Third, section 251(c)(4) requires incumbent LECs to offer to new entrants their retail exchange services at wholesale rates.

The 1996 Act includes provisions to guarantee the swift implementation of the local competition requirements. For example, the 1996 Act required the FCC to adopt regulations implementing section 251 within six months of enactment. Furthermore, the 1996 Act establishes time constraints for negotiations relating to new entrants' Section 251 requests. 47 U.S.C. § 252(a). If the parties are unable to negotiate an agreement within 135 days of the request to negotiate, an arbitration procedure exists to conclude an agreement. The 1996 Act does not reflect a preference for either negotiation or arbitration; the objective of the Act is for the carriers to reach an agreement by either means. All negotiated and arbitrated agreements must be approved by the relevant state

commissions. *See* 47 U.S.C. §§ 252(b)(1), (b)(4)(C), and (e). Decisions of the state commissions may be appealed to a federal district court to determine whether the arbitrated agreement meets the section 251 and 252 requirements. 47 U.S.C. § 252(e)(6).

Once agreements are concluded, Section 252(i) requires an incumbent local exchange carrier to "make available any interconnection, service, or network element provided under an agreement . . . to which it is a party to any other requesting carrier upon the same terms and conditions as those provided in the agreement." Id. § 252(i).

Different Forms of Competitive Entry, and the Need for Disaggregated Unbundling of Interconnection Agreements

A brief explanation of the different means by which aspiring competitors enter local telecommunications markets is necessary to provide a context for Congress' decision to make interconnection agreements available on a disaggregated basis, rather than on a unitary basis.

The extent and importance of the various items needed by new entrants from the incumbent telephone providers is dictated by their individual business plans, and reflects their particular resources and goals. For example, new carriers that already have access to their potential subscribers' homes through cable links do not require unbundled loops. Similarly, new entrants pursuing solely a resale strategy may not need any physical facilities from an incumbent, and therefore may be concerned only with the terms under which the incumbent provides resold services. Yet other competitors may wish to combine multiple entry strategies depending on particular circumstances.

Absent a disaggregated "most-favored-nation" requirement, this heterogeneity of entry strategies creates an immense opportunity for incumbents to prevent any meaningful access to interconnection agreements for non-signatories. For example, an incumbent could easily obtain an agreement containing inflated unbundled loop prices with a new entrant that is pursuing exclusively a resale strategy, since the reseller would not intend to purchase such items. If a "most-favored nation" rule were applicable only to an *entire* agreement, new entrants planning to use both resale and unbundled loops could be effectively disabled from utilizing any portion of such agreements because they would have to accept the unattractive loop rates along with the resale terms. Such manipulation can only be prevented if interconnection agreements are made available on a *disaggregated* basis.

Implementing Regulations

The FCC issued a notice of proposed rulemaking to implement the 1996 Act's requirements, in accordance with section 251(d)(1) and the FCC's general rulemaking authority. In the *First Report and Order*[3], issued on August 8, 1996, the Commission adopted rules that detailed certain of the LECs' pricing and non-pricing requirements of sections 251(c) and 252. The Commission also issued a *Second Report and Order* which dealt with other non-pricing issues, such as "dialing parity."

In its *First Report and Order*, the FCC construed Section 252(i) in light of both its language and purpose, and

---

[3] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) (AT&T App., Appendix G).

concluded that it required incumbents to make available to requesting carriers "any individual interconnection, service, or network element arrangement contained in an agreement," 47 C.F.R. § 51.809(a), and did not obligate requesting carriers invoking its provisions to accept all of the terms of the prior agreement in its entirety. This is the "most-favored-nation" rule that the incumbents refer to as "pick-and-choose."

The Commission agreed with Petitioners that the language of Section 252(i) required the incumbent LECs to make available to requesting carriers the particular network elements, services, or interconnection terms contained in agreements, and that this was necessary to prevent ILECs from creating "poison" agreements that could not be used by non-signatories (*First Report and Order* ¶ 1312 (AT&T App. at 262a)):

> [F]ailure to make provisions available on an unbundled basis could encourage an incumbent LEC to insert into its agreement onerous terms for a service or element that the original carrier does not need, in order to discourage subsequent carriers from making a request under that agreement.

The Commission also rejected the ILECs' claim that disaggregated application of "most-favored-nation" rights would slow negotiations (*id.* at ¶ 1313 (AT&T App. at 263a)):

> We also choose this interpretation despite concerns voiced by some incumbent LECs that allowing carriers to choose among provisions will harm the public interest by slowing down the process of reaching

> interconnection agreements by making incumbent LECs less likely to compromise. In reaching this conclusion, we observe that new entrants, who stand to lose the most if negotiations are delayed, generally do not argue that concern over slow negotiations would outweigh the benefits they would derive from being able to choose among terms of publicly filed agreements.

Eighth Circuit Decision Under Review

Incumbent LECs and several state utility commissions filed petitions for review of the Commission's orders. The petitions were consolidated in the Eighth Circuit under 28 U.S.C. § 2112. The Eighth Circuit had jurisdiction over the petitions pursuant to 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a). The Eighth Circuit initially stayed the FCC's pricing and "most-favored-nation" regulations and eventually vacated those regulations in the decision under review.

In the decision under review, the Eighth Circuit held that the FCC had exceeded its jurisdiction by promulgating rules to implement the pricing requirements of sections 251(c) and 252(d) of the 1996 Act, as well as rules related to many non-pricing requirements. The Eighth Circuit determined that the services at issue were "intrastate services" and, thus, the FCC did not have jurisdiction over them under section 2(b) of the Communications Act. 120 F.3d at 796. (AT&T App. at 15a) In addition, according to the court, none of the Communications Act's general provisions or the new local competition provisions trumped section 2(b), thereby giving the FCC authority over the purported "intrastate" requirements. *Id.* at 797 (AT&T App. at 18a) . As a result, the Eighth Circuit vacated the FCC's rules covering pricing requirements of sections 251(c) and 252(d).

The Court did hold that the FCC had jurisdiction to issue interpretive rules concerning some subsections of section 252. *Id.* at 794-95 n.10 (AT&T App. at 12a). However, among the rules that the court invalidated was the "most-favored-nation" rule, which the FCC had adopted to interpret section 252(i), which allowed new market entrants to include any provision of a prior-approved agreement between an incumbent LEC and another entrant, in their own agreement with the incumbent LEC.

The Eighth Circuit vacated the rule on the grounds that the Commission's interpretation of the subsection was "an unreasonable construction of the Act" *Id.* at 800 (AT&T App. at 24a). In determining the Commission's interpretation was unreasonable, the court acknowledged that the words of subsection 252(i) "could indicate that the FCC's approach was intended by Congress," but, it concluded, "the language of subsection 252(i) in isolation does not clearly reveal Congress' intent on this issue" *Id.* (AT&T App at 25a).

The Eighth Circuit then proceeded to "'look to the structure and language of the statute as a whole' to determine if the Commission's interpretation of this ambiguous provision is a reasonable one," *id. citing National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407, 417 (1992). The court concluded it was not because the FCC's rule would "thwart the negotiation process and preclude the attainment of binding negotiated agreements." *Id.*

After issuance of the Eighth Circuit's decision on July 18, 1997, the court subsequently granted petitions for rehearing filed by the incumbents concerning the Commission's rule requiring that: "Except upon request, an incumbent LEC shall

not separate requested network elements that the incumbent LEC currently combines" (Rule 51.315(b))(AT&T App. 71a). Four petitions for certiorari were filed from the Eighth Circuit's orders, and four cross-petitions were filed by appellants below. Review was granted on January 26, 1998, on all issues raised in the petitions and cross-petitions.[4]

SUMMARY OF ARGUMENT

1. The Eighth Circuit's vacation of the Commission's disaggregated "most-favored-nation" rule is plainly incorrect under *Chevron USA* v. *NRDC*, 467 U.S. 837, 842 (1984), and effectively disables one of the most important statutory protections conferred upon aspiring competitors by Congress.

The Eighth Circuit erred in applying *Chevron* in two ways. First, its interpretation conflicts with the plain language of Section 252(i): "A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement . . . ." (emphasis added). As the Commission correctly observed: "Congress drew a distinction between 'any interconnection, service, or network element[s] provided under an agreement,' which the statute lists individually, and agreements in their totality." *First Report and Order* ¶ 1310 (AT&T App. at 261a).

---

[4] Subsequent to the grant of certiorari in the present proceedings, the Eighth Circuit issued an order granting NARUC's request for "enforcement" of the Eighth Circuit's mandate. That order is the subject of petitions for certiorari filed by the government (*FCC v. Iowa Utilities Board*, Case No. 97-1519) and private parties, (*see, e.g.* , *AT&T v. Iowa Utilities Board*, Case No. 97-1520). Those petitions also request that they be consolidated with the current proceedings.

The Eighth Circuit concluded that the text of Section 252(i) should be interpreted to read as follows: "A local exchange carrier shall make available any agreement approved under this section." But this interpretation has far less support in the actual text than the Commission's, which the court acknowledged: " ... could indicate that the FCC's approach was intended by Congress" 120 F.3d at 800 n.22 (AT&T App at 25a). Having concluded the Commission's interpretation was supported by the statutory language, the court should have affirmed the "most-favored-nation" rule.

The second fundamental error in the Eighth Circuit's analysis of Section 252(i) is its conclusion the 1996 Act so strongly favors negotiated outcomes that it prohibits the burden of having to negotiate each interconnection term to "stand on its own". Furthermore, the court dismissed the Commission's point that any incremental delay in negotiations created by the rule was a burden for the new entrants, with their need to enter markets quickly, not the incumbents, with an announcement that: "We believe incumbent LECs have as much interest in avoiding the costs of prolonged negotiations or arbitrations as do the requesting carriers" *Id.* at 801 (AT&T App. at 27a).

The new entrants that make up present petitioners are dismayed the Eighth Circuit would vacate so important a rule based on a conclusion for which there is no support in the record, and which is so contrary to common sense. The incumbents currently control local markets with revenues over $100 billion dollars annually. They plainly have immense incentives and capacity to delay negotiated settlements. Accordingly, petitioners ask this Court to affirm the Commission's implementation of Section 252(i).

2. The Eighth Circuit concluded that the FCC lacked pricing authority under Section 251(d) on the ground that Section 2(b) of the Telecommunications Act is a flat prohibition on federal pricing authority over intrastate services absent clear statutory authority.

But Section 2(b) was enacted to prevent federal intrusion into purely intrastate matters in the absence of express statutory authority. The Eighth Circuit's interpretation turns it into a bulwark of state rights that only the most explicit form of Congressional authorization can ever intrude upon. It also gives more weight to a 64 year old provision, passed at a time when Congress could not have foreseen the advances in telephony that prompted enactment of the 1996 Act, than to Section 251(d), which specifically grants to the Commission the authority to promulgate the vacated rules.

The Eighth Circuit's decision also conflicts with settled federal law on the power of the Federal Communications Commission to regulate facilities that are used in the provision of inter- and intrastate services. Therefor, the Eighth Circuit's decision should be overturned and the FCC's pricing rules upheld.

ARGUMENT

I. THE EIGHTH CIRCUIT HAS EXCEEDED ITS JUDICIAL DISCRETION BY IGNORING PLAIN STATUTORY LANGUAGE, REJECTING THE FCC'S REASONABLE INTERPRETATION OF SECTION 252(i), AND SUBSTITUTING ITS OWN INTERPRETATION FOR THAT OF THE FCC.

A. The Eighth Circuit ignored the plain statutory language.

Section 252(i) of the 1996 Act provides that:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

In its *First Report and Order*, the Commission interpreted Section 252(i) to allow a requesting carrier to obtain individual provisions of previously-negotiated interconnection agreements with other carriers. The Commission's rule followed the statutory language of the 1996 Act by requiring that:

> [a]n incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act.

47 C.F.R. § 51.809(a) (1996), *vacated, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997). In its decision, the Eighth Circuit rejected the Commission's interpretation, even though it found that interpretation to be reasonable and permissible,[5] and substituted its own: that LECs need not offer to other carriers individual agreement provisions, rather that they need only make available agreements in their entirety. In so doing, the court chose to ignore the plain meaning of the statutory language and delve into an unnecessary, unwarranted, and incorrect exercise in statutory interpretation.

It is a well-established principle of statutory construction that when the plain meaning of statutory language is clear upon its face, a court must go no further to make its own interpretation.

> [W]hen words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous sources. In other words, *the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent*.

Caminetti v. United States, 242 U.S. 470, 37 S.Ct. 192, 196 (1917) (emphasis added). That principle remains intact today:

> In a statutory construction case, the beginning point must be with the language of the statute, and when a

---

[5] *See infra* Part I.B.

> statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished. . . . The controlling principle . . . is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written.

Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475-476 (1992).

Section 252(i), as written, and as interpreted by the Commission, clearly states that an incumbent LEC must offer to a requesting carrier *any* "interconnection, service or network element" provided under an approved agreement "under the same terms and conditions as those provided in the agreement." Principles of grammatical construction alone support the Commission's interpretation, in that the word "any" in Section 252(i) modifies "interconnection, service, or network element," rather than "agreement." The end result is that any single, previously-negotiated interconnection, service, or network element provided for in any agreement must be made available to subsequent requesting telecommunications carriers under the same terms and conditions available to the original carrier that negotiated the agreement.

Section 252(i) may not be a statutory provision that state utility commissions or the Eighth Circuit like, but it is how the statute is written and the statute must be taken at face value. If incumbent LECs do not like section 252(i), their remedy must be obtained from Congress, not from the Commission, and not from the court of appeals.

B. The FCC's interpretation was reasonable, as conceded by the Eighth Circuit, and should not have been rejected.

Even if the Eighth Circuit's determination was correct that the statutory language is "ambiguous," the court exceeded its powers by rejecting the FCC's reasonable interpretation of the language and substituting its own interpretation. Under principles of administrative law, a court must leave undisturbed any reasonable statutory interpretation made by an agency afforded the power and authority to interpret the statute.

When a court reviews an agency's construction of the statute it administers, it is confronted with two questions. First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842 (1984).

Indeed, the Eighth Circuit acknowledged that "the words 'any interconnection, service, or network element' *could indicate* that the Commission's approach was intended by Congress." 120 F.3d at 800, n.22 (AT&T App. at 25a)

(emphasis added).[6] Having conceded that the Commission's interpretation was reasonable or permissible, the court's review should have ended. Nonetheless, the court went on to substitute its own construction of the statute:

> However, these words do not foreclose the possibility that an entrant's selection of an individual provision of a prior agreement would require it to accept the terms of the entire agreement. In this context, the quoted words could simply indicate that an incumbent LEC would not be able to shield an individual aspect of a prior agreement from the reach of a subsequent entrant who is willing to accept the terms of the entire agreement.

Id.

---

[6] The reasonableness of the FCC's interpretation is also underscored by the fact that other forums' independent review of this provision concur with the Commission, not the Eighth Circuit. *See, e.g., In the Matter of TCG Colorado*; Docket No. 96A-329T, adopted November 5, 1996, at 19: "[W]e do not accept [US WEST's] position that § 252(i) contemplates carrier acceptance of interconnection agreements only in their entirety. While we acknowledge that the FCC's MFN holding was one of the mandates recently stayed by the Eighth Circuit Court (see footnote 1), our independent interpretation of the Act is inconsistent with USWC s contention. The language in §§ 252(i) compels an ILEC to make available 'any interconnection, service, or network element (emphasis added)' provided in an approved agreement to other requesting carriers 'upon the same terms and conditions as those provided in the agreement.' The plain and clear provisions of the Act do not support USWC's argument on this issue." (Emphasis supplied except as noted in the original.)

Indeed, the Eighth Circuit chose to examine the statutory provision within the context of the entire Communications Act in order to decipher Congressional intent.[7] The court's analysis led it to conclude that the FCC's rule conflicts with the Act's design to promote negotiated binding agreements. *Id.* at 801(AT&T App. at 26-27a). Once the Eighth Circuit had found a Congressional preference for voluntarily negotiated interconnection agreements, it then further surmised that this preference is based on a goal of encouraging the give-and-take process of negotiations. However, even if the 1996 Act does reveal a preference for voluntarily negotiated interconnection agreements, that preference could just as easily be based on some other theory, such as preservation of state commission resources by avoiding arbitration, or a belief that agreements would be entered into more quickly when negotiated rather than arbitrated. These philosophies would be just as well-served by the Commission's "most-favored-nation" rule, which would allow LECs and requesting carriers to reach agreement in, presumably, a relatively short period of time and without use of substantial commission resources, by avoiding arbitration.

In fact, the Commission did base its conclusion on the idea that its rule would facilitate negotiated agreements, noting that:

---

[7]The incumbent LECs' argument to the Eighth Circuit that it must look to the "structure and language of the statute as a whole" is incorrect with respect to Section 252(i). 120 F.3d at 800 (AT&T App at 25a) Surely, a court need make no further inquiry into the reasonableness of a statutory interpretation after conceding that the interpretation is reasonable.

> . . . failure to make provisions available on an unbundled basis could encourage the incumbent LEC to insert into its agreement onerous terms for a service or element that the original carrier does not need, in order to discourage subsequent carriers from making a request under that agreement.

First Report and Order, ¶ 1312 (AT&T App. at 262a). Further, the Commission reasonably believed that its interpretation of section 252(i) would facilitate negotiation by "provid[ing] new entrants with a realistic benchmark upon which to base negotiations." *Id.* ¶ 1323 (AT&T App. 268a).

These differing conclusions as to how best to serve the underlying goal of facilitating negotiations demonstrate the precise reason for the standard of deference to reasonable agency interpretations: efforts to determine Congressional intent can, and likely will, produce different results, each of which may be reasonable. As between the agency which was created for the express purpose of administering and implementing the 1996 Act and the court with only passing exposure to the issue, the agency is better-positioned to make the first interpretation of the statutory language, which, if reasonable, must not be disturbed. In the hierarchy of statutory interpretation, a reasonable agency interpretation of a provision of its organic act is entitled to great deference from reviewing courts. *Chevron*, 467 U.S. 837 (1984).

The Eighth Circuit should never have reached the second phase of the *Chevron* inquiry. Having done so, however, it should have ended its interpretation efforts after acknowledging that the Commission's interpretation of the provision is permissible. The Commission holds the power and authority to interpret the 1996 Act and each of its

provisions. Any reasonable interpretation that it makes must be respected by a reviewing court, and that court must ignore the temptation to act on any displeasure with the outcome of that reasonable interpretation.

Nowhere does the Eighth Circuit state that the Commission's interpretation is unreasonable; indeed, it concedes that the interpretation is reasonable. It simply likes its own interpretation better. Under *Chevron*, such bold substitution of a court's own policy judgments for those of the agency charged by Congress with responsibility for implementation of the 1996 Act, is not an option. In so doing, the court rejected a *reasonable and permissible* interpretation of the agency authorized by Congress to administer the statute. Legal precedent, however, dictates that the court may not do so:

> When a challenge to any agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.

Id. at 866. Therefore, the Eighth Circuit's interpretation of the "most-favored-nation" rule is erroneous and must be reversed.

II. THE EIGHTH CIRCUIT'S DETERMINATION THAT THE FCC LACKED JURISDICTION TO IMPLEMENT THE 1996 ACT'S LOCAL COMPETITION REQUIREMENTS IS ERRONEOUS BECAUSE IT CONFLICTS WITH DECISIONS OF THIS COURT AND THE COURTS OF APPEALS.

A. The Eighth Circuit's holding that the interconnection duties required by section 251 of the 1996 Act constitute intrastate communications services under section 2(b) of the Communications Act is erroneous and conflicts with decisions of courts of appeals.

The Eighth Circuit determined that the interconnection duties that incumbent LECs owe to new market entrants under the 1996 Act, are considered to be intrastate services. Since section 2(b) of the Communications Act states that the Commission does not have jurisdiction over any "intrastate communications services," the Eighth Circuit concluded that the FCC's pricing regulations regarding these services exceeded the FCC's authority. As a result, the Eighth Circuit held that the Commission could issue rules regarding the "intrastate services" required by the 1996 Act only if explicit authority was granted to the FCC. Furthermore, although the Eighth Circuit held that the FCC had authority over certain sections of the 1996 Act, it limited the FCC's jurisdiction to promulgating interpretive rules.

Contrary to the Eighth Circuit's decision, the local competition requirements in the 1996 Act are not limited to intrastate communications services, and, therefore, the states do not possess exclusive jurisdiction over these requirements

under section 2(b) of the Communications Act. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986). The facilities that are subject to the new requirements of the 1996 Act are used jointly to provide interstate and intrastate communications services, such as exchange access services. Courts have previously upheld the FCC's authority to require incumbent LECs to permit other providers to interconnect with their facilities and to offer individual components of their telephone networks for sale at cost-based rates, all for the purpose of advancing competition at the local level.

Courts have relied on the fact that local telephone facilities are also used to provide interstate services to justify their decisions to uphold FCC regulations related to these facilities. Courts have held that the FCC did not exceed its jurisdiction by adopting rules that promote competition in the provision of telephone sets and customer premises equipment, inside wiring, information, and enhanced services. *See, e.g.*, *NARUC v. FCC*, 880 F.2d 422, 431 (D.C. Cir. 1989); *California v. FCC*, 39 F.3d 919, 933 (9th Cir. 1994); *NCUC*, 537 F.2d at 791-94.

Instead of relying on the fact that the local telephone facilities were also used to provide interstate services, the Eighth Circuit focused on the extent of interstate services provided over local telephone facilities. In deciding that the 1996 Act requirements solely involved intrastate services, the court noted that incumbent LEC facilities are physically local, that they are primarily used for intrastate services, and that the provision of the local telephone facilities on a competitive basis would have a minimal effect on interstate services. Therefore, according to the court, section 2(b) still applies. *Iowa Utils. Bd.*, 120 F.3d at 799.

However, the Eighth Circuit overlooked a series of courts of appeals cases that have held such distinctions to be irrelevant. The FCC's jurisdiction is determined by the use of the telephone facilities, and not by the location of the facilities used to provide service. *California v. FCC*, 4 F.3d 1505 (9th Cir. 1993); *see also NARUC v. FCC*, 746 F.2d 1492 (D.C. Cir. 1984); *NCUC v. FCC*, 537 F.2d 787 (4th Cir. 1976). Moreover, the FCC's jurisdiction is not affected, even if the extent of interstate usage of the local telephone facilities was minimal relative to the intrastate usage. *Puerto Rico Tel. Co. v FCC*, 553 F.2d 694, 700 (1st Cir. 1977); *NCUC*, 537 F.2d at 791-94.

In support of its decision, the Eighth Circuit cites 47 U.S.C. § 410, which directs a separation of expenses and investment so that states and the FCC can determine rates for the interstate and intrastate services that each regulates. However, courts have uniformly found that developing distinct interstate and intrastate requirements that will both apply to such interconnection access arrangements is not feasible. *See California*, 39 F.3d at 933; *NCUC*, 537 F.2d at 791-94. In addition, developing such dual requirements for the pricing of facilities that are purchased as a whole and then used for both interstate and intrastate services, has similarly been held to be impossible. *State Corp. Comm'n v. FCC*, 787 F.2d 1421, 1427-28 (10th Cir. 1986).

Finally, sections 251 and 252 of the 1996 Act require all incumbent LECs to provide local telephone facilities to new market entrants under one system of rates, terms and conditions. These rates, terms, and conditions do not differ depending on the extent to which the new entrant will offer interstate exchange access or intrastate exchange services. Section 251 allows the FCC to issue guidelines for setting

rates, terms and conditions for the arrangements contemplated under the 1996 Act.

B. Regardless of the applicability of section 2(b) of the Communications Act, the Eighth Circuit's denial of jurisdiction to the FCC is erroneous.

The Eighth Circuit disregards the fact that the 1996 Act, including the pricing standards for interconnection, unbundled elements, and local service resale, was enacted to effectuate a *national* policy in favor of telecommunications competition, and that this national policy is applicable to intrastate and interstate telecommunications services. In this regard, the 64-year old jurisdictional limitation on the FCC's authority contained in section 2(b) should have been considered by the Eighth Circuit in light of the clear national policy favoring local competition, established by Congress in 1996, and the pivotal role in developing rules to implement that policy imposed by Congress on the FCC.

Even if the Eighth Circuit were correct that the provision of telecommunication services required by the 1996 Act constitutes "intrastate communications services,"[8] the FCC

---

[8] There is no definition of "communications service" in the Act. However, the definition of "interstate communication" contained in Section 153(22) indicates that in 1934 Congress was contemplating retail local or long distance service as was known at the time. Congress did not, because it could not have, contemplated the technical advances that would lead to the provision of unbundled network elements and the other requirements of Section 251. Thus, it is not clear that the provision of unbundled network elements, for example, should even be considered a "communications service" much less an "intrastate

(continued...)

nevertheless has jurisdiction to adopt and enforce pricing regulations to implement the Act's requirements.

Section 251(c) of the 1996 Act requires incumbent LECs to provide interconnection services to any other telecommunications carrier "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of . . . this section and section 252." Section 251(d) explicitly provides the FCC with authority to promulgate regulations implementing section 251, including subsection c, as it requires "within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section."

Despite the broad language of subsection (d) the Eighth Circuit held that section applies only to six subparagraphs of section 251, which specifically mention the Commission. 120 F.3d at 794 n.10 (AT&T App. at 12a). These subparagraphs do not grant rulemaking authority independently, however, but limit the scope of the authority to promulgate rules granted elsewhere in the Act. *See* § 251(d)(2) ("[i]n determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider [the following factors]").

The Eighth Circuit also dismissed the applicability of several other sections of the Communications Act that give the Commission authority to issue and enforce regulations implementing all requirements of the Communications Act,

---

[8](...continued)
communications service."

which now include the local competition provisions added by the 1996 Act. For example, 47 U.S.C. § 151 provides that the Commission "shall execute and perform the provisions of this Act," but the Eighth Circuit disregarded this section. Similarly, 47 U.S.C. § 154(i) states that the Commission "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this [Act], as may be necessary in the execution of its functions" and 47 U.S.C. § 303(r) states that the Commission can "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this [Act]."

However, the Eighth Circuit denied the applicability of these sections, explaining that they granted only ancillary authority, in addition to explicit authority present elsewhere in the Communications Act. 120 F.3d at 795 (AT&T App. at 12a). In addition, the Eighth Circuit did not accord any weight to 47 U.S.C. § 201(b), which provides that the Commission "may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this [Act]." The court restricted the Commission's rulemaking authority under section 201(b) to "interstate or foreign communications services" because that is the subject of section 201(a). *Id.* However, the court cannot ignore the plain words of a statutory provision. The fact that section 201(a) does not address the entire Communications Act is irrelevant in light of the express grant of authority to the Commission in section 201(b) to implement the provisions of the entire Act.

The cited sections explicitly grant the FCC rulemaking authority over all requirements of the Communications Act, and in particular Section 151, yet the Eighth Circuit denied

the FCC jurisdiction over the pricing elements, which were added by the 1996 Act for the express purpose of implementing a national policy of opening local telephone markets to competition.

As additional support for its conclusion that the FCC did not have authority to adopt and enforce national pricing rules to guide the states, the Eighth Circuit relied on the absence of any reference to the FCC in certain sections in the 1996 Act. Based on the fact that section 252(c)(2) requires states "to establish any rates for interconnection, services, or network elements according to subsection (d)," while section 252(d) does not mention FCC rules, the Eighth Circuit assumed that Congress did not contemplate the FCC's involvement. The court provided no justification for its decision to ignore the specific grant of jurisdiction in section 251(d), as well as the general grant of jurisdiction in other sections of the Communications Act. *See* 120 F.3d at 795 (AT&T App. at 13a).

Even apart from these provisions, the Eighth Circuit's assumption that the 1996 Act did not provide any role to the Commission in establishing rules to govern rates is erroneous for several reasons. First, section 252(c)(1) states that when a state commission resolves "any open issue," which includes "charges" (as referenced in section 252(a)), it must "ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251." Therefore, section 252 does not omit any reference to the FCC's authority, and in fact presumes the participation of the Commission in establishing prices to be charged by incumbent LECs. Moreover, section 251(c)(2), which discusses the incumbent LECs' duty to provide interconnection services, requires rates

to be set in accordance with the requirements of sections 251 and 252. 47 U.S.C. § 252(c)(2).

The pricing standards set forth in section 252 are, therefore, part of the section 251 requirements. As such, the pricing standards are an issue for which the Commission is responsible for establishing regulations, under section 251(d)(1), to implement the 1996 Act. 47 U.S.C. §§ 251(c)(2) and (d)(1), 252(d). The Eighth Circuit uses section 2(b) as a means to prevent interpretation of the 1996 Act, in accordance with its plain meaning and with Congress' overall objectives. By leaving entirely to the states the regulation of the 1996 Act's pricing requirements, the Eighth Circuit is denying the FCC the authority to promulgate rules for its intended purpose -- to establish nationally-uniform rules governing the pricing of incumbent LEC telephone services and facilities for the purpose of opening local telephone markets throughout the nation, as envisioned by Congress in enacting the Telecommunications Act of 1996.

The effect of the Eigth Circuit's mistake is illustrated by an examination of Section 251(c)(6). It is manifest from the legislative history this provision was adopted to expand the FCC's authority over the collocation of new entrants within incumbents' central office to include both virtual (where the equipment is owned by the incumbent, but under the direction of the new entrant) and physical arrangements (where the new entrant both owns and controls the equipment): "This provision is necessary to promote local competition because a recent court decision indicates that the Commission lacks the authority under the Communications Act to order physical collocation. (*See Bell Atlantic Tel. Co.* v. *Federal Communications Commission*, No. 92-1619 (D.C. Cir. June

10, 1994)."[9]

The Eighth Circuit's inflation of Section 2(b) into a requirement that federal authority over state matters must be drafted with laser-like precision has thus creates the absurd result that Congress' clear and unequivocal expansion of the FCC's authority over collocation would be completely disabled. Given Congress' plain intent to confer authority upon the FCC over both interstate and intrastate services pursuant to Section 251(c), the Eighth Circuit's decision should be reversed.

CONCLUSION

The Court should uphold the Federal Communication Commission's interpretation of the "most favored nation" language contained in Section 252(i) of the Act and the Commission's jurisdiction and authority to promulate pricing rules under Section 251 of the Act.

Respectfully submitted,

RICHARD J. METZGER
888 17th Street
Suite 900
Washington, D.C. 20006
(202) 969-2583

MITCHELL F. BRECHER*
DEBRA A. MCGUIRE
FLEISCHMAN AND WALSH, L.L.P.
1400 Sixteenth Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 939-7900

Counsel for Association for Local Telecommunications Services

April 3, 1998

*Counsel of Record

---

[9] H. Rep. No. 104-204, 94th Cong. 1st Sess. (1995) at 73.

RILEY M. MURPHY
CHARLES H. N. KALLENBACH
JAMES C. FALVEY
AMERICAN COMMUNICATIONS
SERVICES, INC.
131 National Business Parkway
Suite 100
Annapolis Junction, MD 20701

Counsel for American Communications Services, Inc.

ALBERT H. KRAMER
ROBERT F. ALDRICH
DICKSTEIN, SHAPIRO, MORIN
& OSHINSKY, LLP
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700

CINDY Z. SCHONHAUT
VICE PRESIDENT,
GOVERNMENT AFFAIRS
ICG COMMUNICATIONS, INC.
9605 East Maroon Circle
Englewood, CO 80112
(303) 572-5960

Counsel for ICG Telecom Group, Inc.

DANIEL M. WAGGONER
DAVIS WRIGHT TREMAINE
2600 Century Square
150 4th Avenue
Seattle, WA 98101
(206) 622-3150

ALAINE MILLER
R. BRUCE EASTER
NEXTLINK
COMMUNICATIONS, L.L.C.
155 108th Ave., NE
Bellevue, WA 98004
(425) 519-8900

Counsel for NEXTLINK Communications, Inc.

TIMOTHY R. GRAHAM
ROBERT G. BERGER
JOSEPH SANDRI
RUSSELL C. MERBETH
WINSTAR COMMUNICATIONS,
INC.
1146 19th Street, NW
Washington, D.C. 20036
(202) 833-8547
Counsel for Winstar

DANIEL L. BRENNER
NEAL M. GOLDBERG
DAVID L. NICOLL
1724 MASSACHUSETTS AVE. NW
WASHINGTON, D.C. 20036
(202) 775-3550

Counsel for National Cable
Television Association, Inc.